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No: 250

In The

Supreme Court of the United States

October Term 1968

JOHN E. COYNE,

Petitioner,

vs.

DONALD WATSON,
SHERIFF, CLERMONT COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John E. Coyne, through his retained counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

John E. Coyne was convicted of possession of an unregistered machine gun, (Revised Code of Ohio, Section 2923.04) by the Court of Common Pleas, Clermont County, Ohio, on April 26, 1966. No written opinion was rendered. The Court of Appeals for the First Appellate District of Ohio affirmed that conviction, without opinion. The Supreme Court of Ohio, on October 26, 1966, sua sponte, dismissed an appeal for the reason that no substantial constitutional question exists.

An action in Habeas Corpus was filed by petitioner on November 18, 1966 in the United States District Court,

Southern District of Ohio, Western Division, which Court rendered its written opinion on January 19, 1967, dismissing said petition and denying the writ of habeas corpus. The opinion is reported at (Appendix A, infra pp. 14-22). Appeal was then perfected to the United States Court of Appeals for the Sixth Circuit, which on March 7, 1968 affirmed the judgment of the Trial Court. (Appendix B, infra, pp. 22-24). Petitioner then moved said Court for a rehearing in light of *Haynes* v. *United States, (19 Lawyers Edition 2d 923)* and the petition for re-hearing was denied on April 10, 1968. (Appendix C, infra, p. 25).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 10, 1968. The jurisdiction of this Court is invoked under 28 USC 1254 (1) since the right of petitioner to be free from unreasonable search and unlawful seizure under Amendment IV to the Constitution of the United States and the right of due process of law under Amendment XIV to the Constitution of the United States were denied to him.

QUESTIONS PRESENTED

1. Are the privileges and guarantees of the Fourth and Fourteenth Amendments to the Constitution of the United States abridged when an affidavit for search warrant does not recite the facts upon which affiant bases his belief but merely states "*Two Eye Witnesses Informed Deputy Sheriff Arthur Guard.*"

2. Are the privileges and guarantees of the Fourth and Fourteenth Amendments to the Constitution abridged when an affidavit for search warrant, based solely on hearsay, does

not allege that such hearsay is from a reliable and/or a credible source?

3. Are the privileges and guarantees of the Fourth and Fourteenth Amendments to the Constitution of the United States abridged when an affidavit for search warrant fails to allege the *time when* affiant obtained the hearsay statements?

4. Is petitioner constitutionally entitled to a release from custody and a final discharge from a state court conviction for possession of an unregistered machine gun where:

a. Petitioner, from the outset, assailed the unconstitutional search and unlawful seizure of evidence: *But,*

b. Petitioner's state court record is silent as to his Fifth Amendment privilege against self-incrimination: *However,*

c. The State statute, requiring registration of certain weapons with the State Adjutant General has never been judicially construed and no guide-line was therefore available to petitioner: *And*

d. Petitioner has exhausted all state court remedies.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are Amendments IV and XIV which read in material parts as follows:

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue,

but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On *August 17, 1965*, Clermont County Deputy Sheriffs, Arthur Guard and Sam Revoir, during the daylight hours entered the place of business of petitioner, known as Boot-Hill Auto Grave Yard, situate on Twelve Mile Road and State Route 132, Clermont County, Ohio, for the purpose of searching buildings, old cars, trucks and junk thereon located. Being armed with a search warrant, issued by Clermont County Court Judge Charles Jackson, on *August 16, 1965* and delivering a copy thereof to petitioner, the officers thoroughly searched a house-trailer, then used as an office, and found in a compartment therein a certain machine gun. The weapon was confiscated by the officers and petitioner arrested for an alleged violation of Revised Code of Ohio, Section 2923.04, without a warrant first being procured, and confined pending his release on bond.

On August 27, 1965, petitioner filed with the County Court, Clermont County, Ohio, his written motion to quash the search warrant, which motion was overruled

by said Court at the preliminary hearing held on September 2, 1965. Thereafter, on December 16, 1965, petitioner was indicted by the Grand Jury, Clermont County, Ohio, for a violation of Section 2923.04, Revised Code of Ohio, (possession of unregistered fire arm) and prior to arraignment thereon, to-wit: On December 28, 1965, petitioner filed with the Court of Common Pleas, Clermont County, Ohio, his written motion to suppress evidence.

Upon the filing of the State's memorandum of law in opposition to said motion, the Trial Court overruled same and ordered this cause set for trial. Trial then being had on April 26, 1966, a jury being waived, and the Trial Court at the commencement thereof overruling petitioner's renewed oral motion to suppress evidence, petitioner was adjudged guilty as charged, the Court receiving in evidence, over the objection of petitioner, the property taken from petitioner's place of business on August 17, 1965, aforesaid. From the judgment of guilty of the Trial Court and the overruling of petitioner's motion for new trial, on April 28, 1966, appeal was taken to the First District Court of Appeals of Ohio which, without opinion, affirmed the Trial Court. Appeal was then taken to the Supreme Court of Ohio, which Court, on October 26, 1966, sua sponte, dismissed said appeal for the reason that no substantial constitutional question exists. That during each stage and phase of the State Court proceedings, petitioner raised and argued the issue of infringement of his constitutional rights and the invalidity of the affidavit for search warrant.

On November 18, 1966, petitioner filed his petition for habeas corpus with the United States District Court, Southern District of Ohio, Western Division, which Court, on January 19, 1967, dismissed the petition and denied the writ of habeas corpus.

Upon the issuance of the District Court's certificate of probable cause, appeal was taken to the United States Court of Appeals for the Sixth Circuit, which Court, on March 7, 1968, affirmed the Trial Court. On March 28, 1968 petitioner filed his petition for a re-hearing in light of *Haynes* v. *United States* (19 Lawyers Edition 2d 923) which petition was denied on April 10, 1968.

The constitutional question of unlawful search has been present throughout the trial and all stages of the appeal. The constitutional question of privilege against self-incrimination was not squarely presented until the aforesaid petition for re-hearing filed in the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Sixth Circuit is squarely in conflict with this Court's decision in:

1. *Aquilar* v. *Texas,* 378 U.S. 108
2. *Jones* v. *United States,* 362 U.S. 257
3. *United States* v. *Ventresca,* 380 U.S. 102
4. *Brinegar* v. *United States,* 338 U.S. 160
5. *Haynes* v. *United States,* 19 Lawyers Edition 2d 923

ARGUMENT

It is elementary that "no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

United States Constitution, Fourth Amendment.
Constitution of The State of Ohio, Article I, Section 14

The issue of what constitutes probable cause is one well known to the Courts.

Brinegar v. *United States,* 338 U.S. 160
Draper v. *United States,* 358 U.S. 307
Carroll v. *United States,* 267 U.S. 132

and such issue is significant and important herein because of the command that probable cause cannot be made out by affidavits which are *purely conclusory* nor by affidavits which do not detail the *"underlying circumstances"* upon which, it is contended, that probable cause exists. *Aquilar* v. *Texas,* 378 U.S. 108; *United States* v. *Ventresca,* 380 U.S. 102.

Petitioner respectfully submits that the affidavit for search warrant, about which this cause revolves, is clearly conclusory, for certainly what the eye witnesses saw and said to the affiant constitutes the facts upon which his belief is based. Is not the reader of this instrument faced with two (2) logical questions:

A. *What did they say?*

And is he not left wandering through the entire range of his imagination in search of an answer? As he stumbles through the mysterious fog of hearsay, which is the complete and wobbly foundation for this affidavit, isn't he puzzled by,

B. *What did they see?*

And can he not reasonably and fairly conclude that it was anything from an arsenal to the proceeds of a recent bank robbery?

Petitioner concedes that it is, at times, difficult to determine whether or not an affidavit demonstrates the existence of probable cause, but contends that the task is most simple when the facts it purports or intends to set

forth are shrouded in doubt, darkness or secrecy. When doubt is obvious, as it is in this case, probable cause cannot exist. Reasonableness, clarity and trustworthy information are the qualities of probable cause — the presence of each must appear before a man of caution legally may believe and assert that crime has been or is being committed. To allow less invites great inroads to the sacred liberties of every citizen. *Won Sun* v. *United States*, 371 U.S. 471.

The INFORMER has long been considered both "a repugnant but vital police device" and "an object of doubt, mistrust and suspicion." He is one who acts under powerful motives — personal gain — revenge — hate and sometimes fear. He is rarely the do-gooder and most often is held in contempt by law enforcement in general and society in particular. He is constantly haunted by the fact of retribution, real or imagined, and he can be believed and trusted only when he has been tried and found to be true — and, even then some substantial doubt about him and his information prevails. Naturally, to be an informer one must either see and/or hear what he tells.

To the complete and utter amazement of petitioner, the District Court found that "eye witnesses" equal the qualities of reliability and credibility and this Trial Court specially *"sees no magic as between one reliable witness and two eye witnesses."* (Appendix A, infra, p. 19).

It is respectfully submitted that simply because one is an *eye witness* does not, therefore, make him reliable, for trial after trial shows, sometimes tragically, that the most unreliable witness is the eye witness. The District Court's conclusion and the affirmance thereof causes petitioner to note that if the seeing witness is reliable and credible simply because he sees, therefore the hearing witness, untried and untested, is also reliable and credible simply

because he hears; that every informer, thusly, is to be believed. Does not the true test of witness reliability, be he a seeing or hearing witness, rest not on the acuteness of his senses, but on his ability to relate clearly, completely and honestly *as he has done in the past.* The badge of reliability is earned — it is and should not be bestowed upon the undeserving — and it is never to be assumed or presumed. The robe of credibility can be worn only when each thread thereof has been put to the test and not found wanting. For these basic reasons the law has insisted that there be "a substantial basis for crediting hearsay," *Jones* v. *United States,* 362 U.S. 257, and that a search warrant affiant represent that his informer was, in fact, reliable and credible. *Rugendorf* v. *United States,* 376 U.S. 528; *Asquilar* v. *Texas,* 378 U.S. 108.

Appellant further submits that the results of the search in the instant case, the finding of the machine gun at his place of business cannot lawfully be considered for the fruit of the search does not justify its illegality. *Byars* v. *United States,* 273 U.S. 28; *Johnson* v. *United States,* 333 U.S. 10.

It is a most elementary principle of law that probable cause must exist at the time when a search warrant is requested and that the affidavit therefor must so affirmatively aver. *Rosencranz* v. *United States,* 356 Fed. 2d 310. While no mention of time, as such, can be found in the affidavit in question, the District Court determined that this basic requirement was completely satisfied when the affiant failed to strike from the *printed* form that portion supplied by the printer, to-wit:

> "that there is urgent necessity that said premises be searched in the night, to prevent said things from being concealed or removed so as not to be found."

Petitioner respectfully submits that this is a most unrealistic approach and conclusion for the following reasons:

a. It is obvious that the failure to strike the aforementioned printed allegation was purely an oversight on the part of the affiant.

b. The Magistrate totally ignored such printed representation for, upon receiving this affidavit on August 16, 1965, he ordered a *day* search, which, in fact, was conducted on August 17, 1965 by Affiant.

Surely had Affiant sought a *night* search warrant, without hesitation or question the same would have been promptly issued to him and just as promptly served.

That, therefore, an affidavit for search warrant should be considered valid because of an oversight is, in petitioner's opinion, a torturing of the law — an assertion of the square peg in the round hole.

Finally, petitioner is constrained to comment on the *"DOUBT"* the District Court saw in this cause (Appendix A, infra, p. 18), the same doubt which prompted the Clermont County, Ohio Prosecuting Attorney to file, in the State Court Proceedings and with his Memorandum of Law offered to the District Court, an Affidavit of the issuing Magistrate in an attempt to crutch the diseased legs upon which the search-warrant affidavit stands. No authority can be located and offered to this Court which authorizes or permits the supplementing of an Affidavit for Search Warrant by an affidavit of the issuing Magistrate; nor can petitioner find any suggestion in any phase of the law which tolerates the breathing of life into a dead document, particularly when the corpse has been used to unearth evidence ultimately offered to convict. Substantial doubt permeates the affidavit under scrutiny and,

petitioner contends, the command of the Constitution is that this doubt should be resolved in his favor.

In the instant cause the record is silent as to any assertion by petitioner of his Fifth Amendment privilege against self-incrimination in the State Courts. It is, however, respectfully submitted that a silent record in this area does not operate to deprive him of the relief sought. In *Anthony M. Grosso* v. *United States,* 19 Lawyers Edition 2d 906, decided on January 29, 1968, with *Haynes* v. *United States,* 19 Lawyers Edition 2d 923, Mr. Justice Harlan said:

> "Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this Court in *Kahriger* v. *Lewis,* which were on the books at the time of Petitioner's trial and left untouched by *Albertson* v. *S. A. C. B., we are unable to view his failure to present this issue as an effective waiver* of the constitutional privilege." (Emphasis added)

Petitioner contends that the record being silent as to any claim by him of the self-incrimination privilege also cannot be realistically and fairly viewed as an effective waiver of this constitutional guaranty for the following reasons:

1. The Ohio Statute, presently Revised Code, Section 2923.04 (Appendix D, infra, p. 26), and formerly Ohio General Code, Section 12810-4, have never been judicially construed or interpreted. Exhaustive research has failed to disclose any reported decision and Petitioner finds only three (3) Attorney General Opinions with regard thereto, none of which touch upon the self-incrimination issue. Thusly, in Ohio, Petitioner had no guideline de-

cision or even reasonable cause to believe that a Fifth Amendment issue exists when a violation of this statute is charged.

2. The National Machine Gun Act of June 26, 1934 (Title 26, United States Code, Sections 5841 and 5851) was substantially embodied in former Ohio General Code, Section 12819-4 and present Revised Code of Ohio, Section 2923.04 and this legislation was held constitutional by the United States Supreme Court in *United States* v. *Miller,* 307 U.S. 174, thusly arming Appellant with assurance that the Ohio version of this act was also constitutionally firm and sound.

3. Oftimes of late and most emphatically it has been held:

   1. "Presuming waiver from a silent record is impermissible" Mr. Justice Brennan in *Carnley* v. *Cochran, Director,* 369 U.S., 506.

   2. Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and no acquiescence in their loss will be presumed from a silent record *Johnson* v. *Zerbst, Warden,* 304 U.S. 458.

CONCLUSION

The obvious and total disregard of pronouncements by this Court in the search warrant area, in and of itself, affords a compelling and substantial reason for the granting of this writ. However, the dramatic and welcome development in the law on January 29, 1968, two and one-half years after petitioner's arrest and while his cause is still before the Courts, provides an additional, serious and nationally interesting issue, which prompts petitioner to submit that rulings and instructions from this Court as to the height, length and depth of *Haynes* v. *United States* are essential for and beneficial to every citizen.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

Southern District Of Ohio
Western Division

No. 6294

JOHN E. COYNE,

Petitioner,

vs.

DONALD WATSON, Sheriff, Clermont County, Ohio,

Respondent.

MEMORANDUM OPINION AND JUDGMENT

(Filed January 19, 1967)

The petitioner, John E. Coyne, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. His claim is that a conviction and sentence in and by the Common Pleas Court of Clermont County, Ohio, pursuant to which he is being detained, was "imposed in violation of the Fourth Amendment of the United States Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution in that petitioner's place of business was searched by police officers under color of a totally invalid and unlawful search warrant, property being unlawfully taken therefrom and illegally and unlawfully admitted in evidence upon trial" by said court.

The case was heard on an "agreed statement of facts" which has been supplemented in certain respects by each party, without objection by the other party, with exhibits appended to briefs.

The facts are as follows:

On August 16, 1965 an affidavit was filed before a magistrate in Clermont County, Ohio, and on that date a search warrant was issued. There is attached hereto a copy of the affidavit and the warrant. On August 17, 1965, during the daytime, the officer, Arthur Guard, entered the premises described in the affidavit and found a machine gun in a house trailer then used by the petitioner as his office. The weapon was confiscated by the officer. On August 27, 1965, petitioner filed with the County Court of Clermont County, Ohio, his written motion to quash the search warrant; that motion was overruled by that Court in September, 1965. Thereafter in December, petitioner was indicted by the Grand Jury of Clermont County, Ohio, for a violation of the machine gun section (2933.04) of the Revised Code of Ohio. Prior to his arraignment, petitioner filed with the Common Pleas Court his written motion to suppress the evidence seized under the search warrant, which was overruled. That motion was orally renewed at the commencement of petitioner's trial; it was again overruled. On trial, petitioner was adjudged guilty. The machine gun was introduced in evidence at trial over his objection and obviously substantially contributed to his conviction. The conviction was appealed to the Court of Appeals for the First Appellate District of Ohio. In that Court the sufficiency of the affidavit and the validity of the search warrant were again attacked — again unsuccessfully. The petitioner thereupon filed a motion to certify to the Supreme Court of Ohio. The same attacks were made in that Court in that motion. The Supreme Court of Ohio on October 26, 1966, sua

sponte dismissed that appeal for the reasons that no substantial constitutional question exists.

The parties in this Court have stipulated that during each stage and phase of the state court proceedings, petitioner raised and argued the issue of infringement of his constitutional rights and the invalidity of the affidavit for search warrant — the record so shows, for all practical purposes. While the rationale of the attack differed at various stages of the state court proceeding, we are satisfied that the ultimate questions involved have been presented to and passed on by each of the state courts, including the court of last resort. Although the Ohio postconviction procedure (§ 2953.21, et seq., Ohio Revised Code) became effective after the submission of *Coleman* v. *Maxwell, Warden,* 351 F.2d 285 (6th, 1965), the reasoning of that case is applicable to the present situation; the asserted Federal Constitution violations have been presented to each of the Ohio state courts and any repetition would be futile. It is held, therefore, that the petitioner has exhausted his state remedies.

See also *Armstrong* v. *Haskins,* 363 F.2d 429 (6th, 1966), and *Kirkland* v. *Maxwell,* — F.2d — (6th, 1966).

The affidavit is and has been claimed as insufficient in several respects, (a) there is nothing in the affidavit to indicate that the informers were "reliable" or "credible" people; (b) there is an insufficiency in respect of the time relative to August 16, 1965, that the eye witnesses informed the Deputy Sheriff of the facts as set forth in the search warrant.

It is true that language may be found in *Jones* v. *United States,* 257, *Brinegar* v. *United States,* 338 U.S. 160, *Aquilar* v. *Texas,* 378 U.S. 108, and *United States* v. *Ventresca,* 380 U.S. 102, which, at first blush, would almost seem to require the use of the verbiage "credible" or "reliable" in connection with the "informer['s] affi-

davits for search warrants based on hearsay, as distinguished from the personal knowledge of the affiant. The affidavit involved in this case does not use either of those adjectives on its face. However, the reason which might require the use of such an adjective or the equivalent is the basic or underlying requirement of something in the affidavit to indicate a "substantial basis for crediting the hearsay." In our view the requirement of "substantial basis" is better met — or at least equivalently met — with the description of the informer or informers as "eye witnesses." This certainly indicates a strong reason for the officer's belief based upon which the magistrate may conclude that probable cause exists. We are strengthened in this conclusion by *United States* v. *Bowling*, 351 F.2d 236 (6th, 1965). In that case, decided since *Ventresca*, a search warrant was attacked as "defective because issued without basis of fact and as a fishing expedition or flier." The affidavit in the *Bowling* case, insofar as relevant to the problem here, contained this:

> "That affiant's reason for stating the laws are being violated are that affiant was informed on this date by W. A. Hennard, who is in custody, that the following stolen articles are in possession of • • • etc."

Judge Edwards, writing the opinion for the Sixth Circuit, concluded "the affidavit on its face recited ample reason for the magistrate to issue the warrant."

With respect to the deficiency in "time," it must be conceded that the affidavit must contain something affirmatively indicating that there is probable cause at or about the time the search warrant is applied for. If it be on personal knowledge, there should be some indication of the officer's personal knowledge *now;* or if it be based on hearsay, there should be some indication that the information was imparted to the affiant at or shortly be-

fore the time of the application and that the information indicated probable cause *now*, not five or six days or months ago. See *Rosencranz* v. *United States*, 356 F.2d 310 (5th, 1966). Were it not for that portion of the affidavit involved here which dealt with a "night search" we would have no hesitancy in holding the search warrant invalid for the reason stated in the *Rosencranz* case. However, the affidavit before us indicates that, based on the information which was received from the two eye witnesses, the officer concluded "that there is urgent necessity that said premises be searched in the night, to prevent said things from being concealed or removed so as not to be found." In our view, this affidavit therefore contains language which shows on its face that the information received by the officer was recently contemporaneous and was to the effect that the machine gun was "now" in the possession of Coyne on the described premises. Compare *United States* v. *Williams*, 351 F.2d 475 (6th, 1965) in which the Sixth Circuit in an opinon written by Judge Peck, held that the inclusion of the word "ready" in an affidavit reciting that a person "kept a ready supply of heroin on hand in his apartment" caused the allegation to be one of "continuing possession," satisfying the requirement that the allegations of a warrant apply to conditions existing "at the time of the issuance of the warrant."

We do not mean to imply that no "doubt" could exist in this question. The state evidently thought a doubt existed — at one of the hearings involving the question before the Common Pleas Court of Clermont County, the State saw fit to supplement the record with an affidavit from the magistrate reciting that "the affiant further says that at the time he received the affidavit for search warrant from the Deputy Sheriff, additional information was given to him as County Court Judge, which information

consisted of the statement of Deputy Sheriff Arthur Guard, that 'witnesses told him, Arthur Guard, that they saw John E. Coyne in the possession of a machine gun on his premises at the intersection of Twelve Mile Road and State Route 132.'" It is, however, our conclusion that the affidavit for the search warrant was sufficient on its face. The "circumstances" were detailed, i.e., the possession by Coyne on certain described premises of a machine gun, the possession of which was forbidden by the applicable laws of the State of Ohio. "Reason for crediting the source of the information is given" — eye witnesses are referred to as such just for that reason — and the plural rather than the singular is certainly an additional reason. This Court sees no magic as between "one reliable witness" and "two eye witnesses." The "magistrate • • • found probable cause" — his action in issuing the warrant indicates such and there is further indication in this record that the magistrate examined the proceedings and did not simply "rubber stamp." *While the request was for a night warrant, the magistrate decided to issue only a "day warrant."* Finally and to continue the quotation from *Ventresca,*

> "The courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." (*United States* v. *Ventresca,* 380 U.S. 102, at page 109.)

The petitioner is now in the technical custody of the Sheriff of Clermont County, Ohio. He is presently at liberty on bond, pending determination of this matter.

It is concluded that the petitioner's prayer for writ of habeas corpus should be denied.

JUDGMENT

This cause came on for hearing on the petition of John E. Coyne for a writ of habeas corpus directed to the Sheriff of Clermont County, Ohio; it was heard on an agreed statement of facts submitted at a hearing in open court and was submitted on such agreed statement of facts, the petition; and the briefs of counsel.

On consideration whereof, it appearing that no rights of the petitioner under the Constitution of the United States have been or are being infringed or denied him;

It is therefore the judgment of this Court that said petition be and the same hereby is dismissed, and the writ of habeas corpus prayer for therein denied.

/s/ TIMOTHY S. HOGAN

Judge

(DULY CERTIFIED)

SEARCH WARRANT

Rev. Code, Secs. 2933.21 to .25

(Filed Clermont County Court, August 16, 1965.)

Clermont County Court, Southern District.

The State of Ohio, Clermont County, ss. Batavia, Ohio
To Sheriff's Office Constable of —— Township, Greeting:

WHEREAS, there has been filed with me an affidavit, of which the following is a copy:

Clermont County Court, Southern District.
The State of Ohio, — County, ss: — Ohio

Before me, Charles W. Jackson, Judge of said County Court, personally came Arthur Guard, Dep. Sheriff, who being duly sworn according to law, deposes and says that on or about the 16th day of August 1965, at the County of Clermont, one J. C. Coyne has in his possession, one machine gun in violation of 2923.04 R.C. things of the value of $100.00 Dollars, to-wit: One machine gun also known as a "grease gun" knowing the same to have been in violation of section 2923.04 and that said complainant believes, and has good cause to believe, that such things are concealed on or about his premises, the junk yard located near the interesection of 12 mile rd and S.R. #132 in buildings, old cars and junked trucks, situated thereon, in the Twp. of Ohio in said County.

The facts upon which such belief is based are two eye witnesses informed dep sheriff Arthur Guard and, further that there is urgent necessity that said premises be searched in the night, to prevent said things from being concealed or removed so as not to be found.

Said affiant further says that, on or about the said day J. C. Coyne did conceal said things, or some part thereof, at the place aforesaid in said County, then and there well knowing the same to have been violation of state law R.C. 2923.04 as aforesaid.

/s/ ARTHUR E. GUARD

Sworn to and subscribed before me, this 16th day of August 1965.

/s/ CHARLES W. JACKSON
County Court Judge

These are, therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter in the day time into said premises in the Twp. of Ohio in the County aforesaid, and there diligently search for the said things, to-wit: one machine gun and that you bring the same, or any part thereof, found on such search, and also the body of J. C. Coyne, forthwith before me, or some other judge or magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand this 16th day of August 1965.

/s/ CHARLES W. JACKSON
County Court Judge

APPENDIX B

No. 17,177

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

JOHN E. COYNE,
Petitioner-Appellant,

v.

DONALD WATSON,
Respondent-Appellee.

ORDER

(Filed March 7, 1968.)

Before O'SULLIVAN, McCREE and COMBS, Circuit Judges.

Appellant, John E. Coyne, was convicted in the Court of Common Pleas of Clermont County, Ohio, of possession of a machine gun without a permit, contrary to § 2923.04 of the Ohio Revised Code. The machine gun which was illegally possessed by the appellant was seized from premises occupied by him by Ohio officers armed with a warrant to search the involved premises. Appellant moved to suppress the seized evidence and objected to its introduction in evidence on the ground that the affidavit for the issuance of the search warrant did not contain sufficiently reliable

information to justify a finding of probable cause by the County Court Judge who issued the warrant. The Ohio courts denied his motion and objection, and he has exhausted all Ohio remedies available.

He moved for a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division, charging deprivation of rights granted to him under the Fourth and Fourteenth Amendments of the United States Constitution. Relief was denied him by the District Court in an opinion by District Judge Timothy S. Hogan. The District Court opinion, reported as Coyne v. Donald Watson, Sheriff, — F.Supp. — (S.D. Ohio, 1967) sets out the facts and the reasons for the District Judge's holding. We agree with his conclusions.

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court be, and it is, hereby affirmed.

Entered by order of the Court.

/s/ CARL W. REUSS
Clerk

APPENDIX C

(CAPTION OMITTED)

ORDER

(Filed April 10, 1968.)

Before O'SULLIVAN, McCREE and COMBS, Circuit Judges.

Upon due consideration of appellant's petition for rehearing in the above cause.

IT IS ORDERED that said petition for rehearing be, and it is, hereby denied.

Entered by order of the Court.

/s/: CARL W. REUSS
Clerk

APPENDIX D

Machine Gun Permit

Ohio Revised Code, Section 2923.04

No person shall own, possess, transport, have custody of, or use a machine gun, light machine gun or submachine gun, unless he first procures a permit therefor from and at the discretion of the Adjutant General, or having such permit, use or consent to the use by another of such weapon in an unlawful manner. The Adjutant General shall keep a complete record of each permit so issued. A separate permit shall be obtained for each gun so owned, possessed or used. The Adjutant General shall require each applicant for such permit to give an accurate description of such weapon, the name of the person from whom it was obtained, the name of the other person to have custody thereof and the place of residence of the applicant and the custodian. Before obtaining such permit each applicant shall give bond to this State, to be approved by the Adjutant General, in the sum of Five Thousand Dollars, conditioned to save the public harmless by reason of any unlawful use of such weapon while under the control of such applicant or under the control of another with his consent: And any person injured by such improper use may have recourse on said bond. This Section does not affect the right of the National Guard of Ohio, Sheriffs, regularly appointed Police Officers of municipal corporations, regularly elected constables, wardens and guards of penitentiaries, jails, prisons, penal institutions or financial institutions maintaining their own police force, and such special officers as are authorized to possess and use such weapons when on duty.

Whoever violates this Section shall be imprisoned not less than one year nor more than ten years.

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No. 250

In The

SUPREME COURT OF THE UNITED STATES

October Term 1968

JOHN E. COYNE,
Petitioner-Appellant,
vs.
DONALD WATSON, SHERIFF,
CLERMONT COUNTY, OHIO,
Respondent-Appellee.

RESPONDENT-APPELLEE'S BRIEF OPPOSING WRIT OF CERTIORARI

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In The

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No. 250

JOHN E. COYNE,
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vs.

DONALD WATSON, SHERIFF,
CLERMONT COUNTY, OHIO,
Respondent-Appellee.

RESPONDENT-APPELLEE'S BRIEF

STATEMENT OF FACTS

The Statement of Facts as set forth in Appellant's Brief are correct statements of the facts pertaining to the proceedings before this Court.

ARGUMENT

(1) The words "two eye witnesses informed deputy sheriff, Arthur Guard", contained in an affidavit for search warrant do meet the requirements of the Constitution of the United States and the Constitution of the State of Ohio as well as the requirements of the Revised Code of the State of Ohio, Section 2933.23, and the defendant's constitutional rights, privileges and guarantees are not violated when an affidavit for a search

warrant is based on information received from two eye witnesses.

The Petitioner-Appellant contends that the words "two eye witnesses informed Deputy Sheriff, Arthur Guard", contained in the affidavit for search warrant, do not meet the requirements of the Constitution of the United States and the Constitution of the State of Ohio and the specific requirements of the Revised Code of the State of Ohio, Section 2933.23, that the affiant shall state the facts upon which such belief is based in the affidavit for search warrant.

The affidavit for the search warrant stated that the Defendant, John E. Coyne, has in his possession one machine gun in violation of Section 2923.04 of the Revised Code of the State of Ohio, and stated that the affiant believed and had good cause to believe that such machine gun was concealed in or about the Defendant's premises, a junk yard located at the intersection of Twelve Mile Road and State Route 132 and the buildings, old cars and junked cars situate thereon in Ohio Township, Clermont County, Ohio. Affiant further stated in his affidavit for search warrant "that facts upon which such belief is based are two eye witnesses informed Deputy Sheriff Arthur Guard."

Section 2933.23 of the Revised Code of the State of Ohio provides as follows:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant. If the judge or magistrate is satisfied

> that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

The Fourth Amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 14, Article I, Bill of Rights, Constitution of Ohio makes similar provision in almost identical language and reads as follows:

> "The right of the people to be secure in their person, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized."

Both the federal and state constitutions require in part that no search warrant shall issue but upon probable cause supported by oath or affirmation. Revised Ohio Code Section 2933.23 adds the further requirement that the affidavit state the facts upon which such belief is based.

In *United States* v. *Ventresca,* 380 U.S. 102, the Supreme Court of the United States had before it for consideration the sufficiency of an affidavit for a search warrant, in which the affidavit was based on:

"observations made by me, and based upon information received officially from other investigators attached to the alcohol and tobacco tax division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation."

The Court of Appeals in holding the warrant insufficient reasoned that the affidavit did not specifically state in so many words that the information obtained was based upon the personal knowledge of the affiant or other reliable investigators. The Court of Appeals had further reasoned "that all the information recited in the affidavit might conceivably have been obtained by investigators other than the affiant, and it could not be certain that the information of these other investigators was not in turn based upon hearsay received from unreliable informants rather than their own personal observations."

The Supreme Court reversed the Court of Appeals and upheld the affidavit as a sufficient basis for a search warrant. In so holding the Court pointed out that the Fourth Amendment commands are practical and not abstract and that affidavits for search warrants "must be tested and interpreted by magistrates in courts in a common sense and realistic fashion," if constitutional policy is to be served. It is noted that such affidavits are usually drafted by non lawyers in the haste of criminal investigations; and that the technical requirements of common law pleading have no proper place in this area. The court specifically points out that it wants to encourage use of search warrants and that if there is a grudging or a negative attitude by reviewing courts, it will discourage police officers in obtaining search warrants.

The Court further states:

"this is not to say that probable cause can be made out by affidavits which are purely conclusory, stating

> only the affiants or informers believe that probable cause exist without detailing any of the 'underlying circumstances' upon which that belief is based. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police, however where these circumstances are detailed, where reason for crediting the source of information is given and when a magistrate has found probable cause the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Applying the foregoing essentials to the case now before this Court, the circumstances are detailed in the affidavit in that it clearly states that the affiant obtained his information in regard to the concealed machine guns from eye witnesses, and further indicates the reason for crediting the source is that they were eye witnesses. In addition to these factors the County Court Judge at the time he received the affidavit for Search Warrant from the deputy sheriff had additional information given to him as County Court Judge, which information consisted of the statement by Deputy Sheriff, Arthur Guard, that witnesses told him, Arthur Guard, that they saw John E. Coyne in the possession of a machine gun on his premises at the intersection of Twelve Mile Road and State Route 132. From the statement of facts in the affidavit and the recital of facts given the County Court Judge at the time the affidavit was given to him, the County Court Judge was satisfied that grounds existed for the issuance of the search warrant and that there was probable cause to believe that they existed.

The County Court Judge must exercise his own judgment as to the facts which constitute probable cause, and this judgment should be conclusive unless arbitrarily exercised. The mere perfunctory recital of the words credible, or that the information was reliable, would not in reality have been a significant addition to facts already before the County Court Judge for his determination in respect to probable cause. To invalidate the search warrant now before this court would be interpreting the affidavit in a hypertechnical, rather than a common sense, manner.

In the case of the *United States* v. *Romano*, 241 F. Supp. 933 the Court had before it for consideration the sufficiency of an affidavit under which a search warrant was issued. The facts stated in the affidavit as grounds for issuance of the search warrant were as follows:

> (1) Information given anonymously to the affiant that the aforementioned materials are being held on said premises.
>
> (2) The detection of a strong odor of mash outside the premises by the affiant.

The Court, citing the case of *U. S.* v. *Ventresca*, 380 U. S. 102, held that in accordance with the principles set forth in the *Ventresca* case, the above affidavit, although meager, sets forth facts sufficient to establish probable cause and to authorize the commissioner to issue a search warrant. The Court reiterated the Supreme Court's mandate in *Ventresca*, "that affidavits for search warrants must be tested and interpreted by magistrates in courts in a common sense and realistic fashion and the courts shall not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner."

In the case of *United States* v. *Haskins*, 345 Fed. 2d 111, the Sixth Circuit Court of Appeals held:

> "In determining whether the United States Commissioner has properly issued a search warrant, we must first recognize that he must exercise his own judgment as to whether the facts in the affidavit constitute probable cause; and his determination is conclusive unless his judgment is arbitrarily exercised. There is, in other words, a presumption that a commissioner has properly performed his duty."

In the instant case the County Court Judge issued the search warrant pursuant to Section 2933.23 of the Revised Code of the State of Ohio, upon the affidavit for search warrant filed with him and such additional information as he obtained from the affiant. In his judgment he had before him sufficient facts to constitute probable cause for the issuance of the search warrant to search the premises of the defendant-appellant, John E. Coyne, for a machine gun.

Although the affidavit for a search warrant states that the facts upon which this belief is based are "two eye witnesses informed Deputy Sheriff Arthur Guard," the Judge issuing the search warrant substantiated the information contained in the search warrant, and ascertained that the eye witnesses had seen a machine gun in the possession of the defendant. In reading the affidavit for search warrant in its entirety, no one reading the said affidavit and applying common sense and a realistic interpretation upon the words contained therein, could arrive at any other conclusion than that the two eye witnesses informed the Deputy Sheriff that they had seen the machine gun in the possession of the defendant.

The affidavit for search warrant must be read in its entirety and no one reading said affidavit can conscientiously say it is purely conclusory, nor that it does not present *circumstances* upon which the magistrate issuing the search

warrant would be presented with facts constituting probable cause.

The criteria for all the cases on searches and seizures are founded in the constitutional provisions of the Fourth Amendment to the Constitution of the United States and in Article I, Section 14 of the Bill of Rights to the Constitution of Ohio. Each case involving a search and seizure, or the issuance of a warrant for the search of property pursuant to the Ohio Revised Code, must stand on its own merits as to being a reasonable search and seizure under the above constitutional provisions. Each of the cases cited in the plaintiff's memorandum in support of jurisdiction and his motion to certify was based upon facts completely alien to the facts now before this Court. In *Ker* v. *California,* 374 U. S. 23, the Supreme Court stated: "there is no formula for the determination of reasonableness of the search, but each case must be decided on its own facts and circumstances."

The constitutional requirement for search warrants is that there be probable cause to believe that the items sought are present when the search is conducted.

> "In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations in everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States,* 338 U. S. 160.
>
> "Probable cause exist where the facts and circumstances within their knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that offense has been or is being committed." *Draper* v. *United States,* 358 U. S. 307.

In the case of *State of Ohio* v. *Rogers,* 27 O.O. (2d) 105 the Court stated:

> "Probable cause exists where the facts and circumstances within the knowledge of the officer making the arrest or search and of which he had reasonable trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that offense has been or is being committed. A search and seizure is not unreasonable even though the officer has no previous knowledge of the violation of the law, provided he acts in good faith and upon such information as induces honest belief that the person in charge of the automobile is in the act of violating the law."

The facts and circumstances in the instant case were that two eye witnesses informed the Deputy Sheriff that they saw a machine gun in the possession of the defendant, John E. Coyne, on his premises at the intersection of Twelve Mile Road and State Route 132. Such facts and circumstances were sufficient to warrant a prudent man in believing the items sought were present, and further were sufficient to induce an honest belief that the items sought were present. These facts and circumstances as set forth in the affidavit and further detailed and supplemented by information related to the County Court Judge who issued the search warrant were sufficient to evidence, that there was probable cause to believe grounds for the issuance of a search warrant existed.

(2) The privileges and guarantees of the Fourth and Fourteenth Amendments of the United States Constitution are not abridged when an affidavit for search warrant does not allege the reliability or credibility of eye witnesses.

As set forth in the Statement of Facts the Petitioner-Appellant, through his attorney, filed a motion in the County Court of Clermont County, Ohio on August 27, 1965, to quash the search warrant, and likewise on Decem-

ber 28, 1965, in the Court of Common Pleas of Clermont County, Ohio, the Petitioner-Appellant, through his attorney, filed a motion to suppress the evidence. On neither of these occasions did the Petitioner-Appellant attempt to subpoena the Deputy Sheriff to cross examine him as to the reliability or credibility of the two eye witnesses who had informed him that they saw a machine gun in the possession of the Petitioner-Appellant; nor was there any attempt at either proceedings to secure the names of the two eye witnesses in order to subpoena them before the Court to cross examine as to their credibility and reliability.

It is clear from the arguments advanced on behalf of the Petitioner-Appellant in his brief before this Court that he is under the false assumption that anyone who responds to their civic duty to assist and inform the law enforcement agencies is, in the vernacular of the underworld, an informer, whom the Petitioner-Appellant, through his attorney, in his brief filed in this Court, considers "an object of doubt, mistrust and suspicion . . . one who acts under powerful motives — personal gain — revenge — hate and sometimes fear."

It is small wonder that in this day and age of classification that reputable, conscientious civic minded citizens, who recognize and fulfill their civic duties and moral obligations to society, are becoming more and more reluctant to fulfill these duties and obligations in aiding law enforcement agencies, when they are faced with being classified as repugnant people, objects of doubt, mistrust, and suspicion.

Fortunately, we still have conscientious citizens who are willing to sacrifice such a classification in order to fulfill their civic obligations; and fortunately we have local County Court Judges, Common Pleas Judges, State Court Appeal Judges, State Supreme Court Justices, Federal District

Judges, and the United States Court of Appeals Judges, who will recognize the credibility of such people unless there is evidence to the contrary.

There is no magic in the use of the word "reliable", to-wit: "two *reliable* eye witnesses informed Deputy Sheriff, Arthur Guard" would not alter the sufficiency of this affidavit for search warrant, if in fact these eye witnesses were not credible or reliable.

In *U. S.* v. *Bozza,* 365 F. 2d 206, decision rendered August 1, 1966 in the United States Court of Appeals, Second Circuit, stated:

> "Affidavit for search warrant in which officer recited that he had received information from an informer was not defective for failure to state that the informer was a previously reliable informer since officer presented other information which presented far stronger reason for believing informant's story was true."

In the instant case, not just one citizen related to the deputy sheriff that he had seen the Petitioner-Appellant in the possession of a machine gun, but two citizens related that they had seen the Petitioner-Appellant in the possession of a machine gun. They related to the officer not what someone else had told them, nor what they had heard from some other source, but what they had actually seen with their own eyes. Unless you assume that we are a nation of prevaricators, I know of no one who would not conclude that there was probable cause for the issuing of this search warrant.

(3) Upon a complete reading of the search warrant it does indicate when the affiant obtained the information upon which the affidavit for search warrant was based.

The question of the element of time as to when the Deputy Sheriff obtained the information from the two eye

witnesses was never challenged by the Petitioner-Appellant in the motion to quash the search warrant in the County Court, the motion to suppress the evidence in the Court of Common Pleas of Clermont County, Ohio, the appeal to the Gourt of Appeals of Clermont County, the appeal to the Supreme Court of the State of Ohio, nor in the petition for writ of habeas corpus in the United States District Court, Southern District of Ohio, Western Division. This question was raised by the Honorable Judge Hogan in rendering his decision on the habeas corpus petition. Likewise, having raised the question, Judge Hogan answered the question by saying the language of the search warrant in requesting the night search substantiated the fact that the Deputy Sheriff had just been informed that the Petitioner-Appellant had the machine gun in his possession.

Furthermore, a complete reading of the affidavit for search warrant further bears out this contention in that the affidavit recites "that on or about the 16th day of August, 1965, in the County of Clermont, one John C. Coyne *has* in his possession one machine gun, in violation of Section 2923.04."

Just as the Petitioner-Appellant had an opportunity to question the credibility of the eye witnesses on his motion to quash the affidavit for search warrant in the County Court of Clermont County, Ohio and upon his motion to suppress the evidence in the Court of Common Pleas, Clermont County, Ohio, he had an equal opportunity to question the time as to when the Deputy Sheriff obtained his information for the search warrant both on his motion to quash the search warrant in the County Court and on the motion to suppress the evidence in the Court of Common Pleas. Reading the affidavit for search warrant in its entirety, it is the contention of the Respondent-Appellee that it does meet the test of probable cause for

the issuing of the search warrant, both as to credibility of the two eye witnesses and as to the time element of belief that the Petitioner-Appellant had the machine gun in his possession at the time that the affidavit for search warrant was obtained.

(4) The National Machine Gun Act of June 26, 1934 (Title 26, United States Code, Section 5841 and 5851) are not analogous to the Ohio State Statutes requiring machine gun permits and Haynes vs. United States' decisions would not be applicable.

The Petitioner, John E. Coyne, was convicted under Section 2923.04 of the Revised Code of the State of Ohio, which section is a part of the criminal code of the State of Ohio and was adopted under the police powers of the sovereign State of Ohio. The Sections of the Revised Code of the State of Ohio pertaining to definition, registration and sale of machine guns are fully set forth in Appendix A.

Section 2923.04 of the Revised Code of the State of Ohio which provides in part as follows:

> "No person shall own, possess, transport, have custody of, or use a machine gun, light machine gun or submachine gun, unless he first procures a permit therefor from and at the discretion of the adjutant general, or having such permit, use or consent to the use by another of such weapon in an unlawful manner. * * *".

In exercising the police powers retained by the states, the legislature of the State of Ohio, within their wise discretion, adopted Section 2923.03 through Section 2923.-05 of the Revised Code of the State of Ohio in order to protect the people of the state of Ohio against such weapons

falling into the hands of criminals who employ these weapons for unlawful purposes.

On the other hand the National Firearms Act, as noted by the Supreme Court in its decision in *Haynes* v. *United States,* Case No. 236, October Term, 1967, is an interrelated statutory system for the taxation for certain classes of firearms, and is not adopted under the police powers for the protection of the people.

Whereas, the National Firearms Act requires finger printing, photographing and a certificate of a local chief of police as a prerequisite for registering a firearm under the National Firearms Act; and in addition thereto provides a penalty for the possession of a firearm which has (at any time) been transferred or made in violation of the act's provision; the State law under which the Petitioner was convicted requires only an accurate description of the weapon and the name of the person from whom it was obtained, the name of the person to have custody thereof and the place of residence of the applicant or custodian, together with the posting of a $5000.00 bond conditioned to save the public harmless from the unlawful use of such weapon. Unlike the National Firearm Act the Ohio State statutes requiring the registration of machine guns does not also make it a punishable offense to possess a machine gun which has not at any time been registered, therefore the requirement of the State statute requiring a person who is purchasing a machine gun to obtain a permit from the adjutant general does not require him to provide information incriminating to himself.

As the Court noted in *Haynes* v. *United States*:

> "The registration requirement is thus directed principally at those persons who have obtained the possession of a firearm without complying with the acts other requirements and who therefore are immediately threatened by criminal prosecution under Sections 5851 and 5861".

This is not true under Ohio State statutes which requires registration at the time of obtaining the machine gun and provides no penalty for purchasing a machine gun which has not previously been registered.

The statute under which the Petitioner was convicted is not analogous to the National Firearms Act, and does not require the applicant to give any information which may be incriminating to him and is therefore not in violation of the Constitution of the United States.

CONCLUSION

The Appellee respectfully submits that the affidavit for search warrant and the ultimate issuance of the search warrant by the Judge of the County Court of Clermont County, along with the search of the Petitioner-Appellant's premises, does not constitute an unlawful search and seizure of the Defendant's property, nor did such action violate, the Appellant's constitutional rights as guaranteed by the Fourth Amendment of the Constitution of the United States and by Article I, Section 14 of the Constitution of Ohio, nor was there a failure to satisfy the requirements of Section 2933.23 of the Revised Code of the State of Ohio.

Petitioner-Appellant's appeal should be denied and the conviction affirmed.

Respectfully submitted,

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Attorney for Respondent-Appellee

APPENDIX A

Section 2923.03 Revised Code of the State of Ohio

(A) As used in section 2923.04 to 2923.06, inclusive, of the Revised Code, machine gun, a light machine gun, or a submachine gun is any firearm which shoots automatically, or any firearm which shoots more than eighteen shots semi-automatically without reloading.

(B) As used in this section:

(1) Automatically means that class of firearms which, while the trigger on the firearm is held back, continues to fire sucessive shots.

(2) Semiautomatically means that class of firearm which discharges one shot only each time the trigger is pulled, no manual reloading operation being necessary between shots.

Section 2923.04 Revised Code of the State of Ohio

Machine Gun Permit.

No person shall own, possess, transport, have custody of, or use a machine gun, light machine gun or submachine gun, unless he first procures a permit therefor from and at the discretion of the adjutant general, or having such permit, use or consent to the use by another of such weapon in an unlawful manner. The adjutant general shall keep a complete record of each permit so issued. A separate permit shall be obtained for each gun so owned, possessed, or used. The adjutant general shall require each applicant for such permit to give an accurate description of such weapon, the name of the person from whom it was obtained, the name of the person to have custody thereof, and the place of residence of the applicant and the custodian. Before obtaining such permit each applicant shall give bond to this state, to be approved by the adjutant general, in the sum of five thousand dollars, conditioned to save the public harmless by reason of any unlawful use

of such weapon while under the control of another with his consent; and any person injured by such improper use may have recourse on said bond. This section does not affect the right of the national guard of Ohio, sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, wardens and guards of penitentiaries, jails, prisons, penal institutions, or financial institutions maintaining their own police force, and such special officers as are authorized to possess and use such weapons when on duty.

Whoever violates this section shall be imprisoned not less than one nor more than ten years.

Section 2923.05 of the Revised Code of State of Ohio

Sale of Machine gun.

No person shall sell, barter, or give to another a machine gun, light machine gun, or submachine gun, without first requiring exhibition of the permit provided by section 2923.04 of the Revised Code, and using the information contained in such permit to make a complete record of such transaction, containing the date of the permit and of the transfer together with the names of the parties thereto, which record shall be preserved by such transferor for a period of five years.

Whoever violates this section shall be imprisoned not less than one nor more than five years.

Section 2923.06 of the Revised Code of the State of Ohio

War trophies.

Sections 2923.03 to 2923.05, inclusive, of the Revised Code do not apply to captured war trophies which are kept for museum purposes and which are in unserviceable condition.